No. 14,204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION OF JAMES M. FIDLER FOR REHEARING.

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To the Honorable Judges Fee and Chambers, Circuit Judges, and Ling, District Judge, of the Above Entitled Court:

Your petitioner, James M. Fidler, is grateful to the Court for that portion of its opinion and judgment rendered herein on March 1, 1955, which holds that $300.00 of each monthly payment involved constituted periodic payments. Your petitioner, however, respectfully requests a rehearing of that portion of the opinion and judgment which holds that the Tax Court was correct in its conclusion "that to the extent of $500.00 a month petitioner's payments are 'installment payments' and therefore not deductible." (Op. p. 7.)

As grounds for said rehearing, your petitioner believes and respectfully submits that said opinion and judgment in reaching said conclusion is erroneous in the following respects:

1. The opinion erroneously holds that the $12,000.00 promissory note involved was a negotiable instrument in strict form, payable absolutely and without contingency, whereas, said note was actually payable to "Roberta L. Fidler, only," was non-negotiable, and was contingent because the payments thereunder were subject to termination in the event of the death of either Mrs. Fidler or petitioner, and probably were subject to termination in the event of Mrs. Fidler's remarriage.

2. The opinion overlooks the fact that the $18,000.00 note, even though negotiable in form, was also subject to the same contingencies.

3. The opinion erroneously holds that the payments of $300.00 per month and $500.00 per month provided by the notes were entirely separate and distinct in purpose and character, whereas in fact, they were of a single character and had but one common purpose.

The opinion erroneously considered each note separately, and failed to consider the three notes, in the aggregate, in determining whether petitioner's alimony or separate maintenance obligation was specified in a principal and fixed sum.

4. In an effort to avoid the controlling effect of the divorce decree which did not specify petitioner's alimony or separate maintenance obligation in a principal sum, the opinion erroneously holds that the principal amounts of the notes were incorporated into the decree by reference.

ARGUMENT AND AUTHORITIES.

In reaching the conclusion that the $500.00 monthly payments contemplated under the $18,000.00 and $12,000.00 notes were installment payments of fixed principal sums, the opinion stresses the negotiable nature of said instruments, stating in part as follows:

> "* * * the promissory notes for $18,000.00 and $12,000.00, which were payable in installments of $500.00 per month under the decree, were negotiable instruments in strict form and would have been payable absolutely in the hands of a bona fide holder for value." (Op. p. 6.)
>
> * * * * * * * *
>
> "The amount of $12,000.00, payable in installments of $500.00 from September 1, 1946, was also an established principal sum. It is set up without contingency in the agreement of February 4, 1944, which required that the fixed sum be evidenced by a fully negotiable instrument, which was delivered." (Op. p. 7.)

On the other hand, and with respect to the $16,200.00 note, which provided for monthly amounts not to exceed $300.00, the opinion states (p. 6):

> "The 'note' for the aggregate which might be paid in the event the contingency was favorable each month is plainly not a 'negotiable instrument.'"

The $12,000.00 Note Was Not Negotiable.

Petitioner respectfully submits that although the $18,000.00 note was in negotiable form, the $12,000.00 note as well as the $16,200.00 note were not negotiable.

The $18,000.00 note was payable to "Roberta L. Fidler, *or order.*" It provided for acceleration, in the event of default, at the option of the "holder" thereof.

But, the $12,000.00 note (as well as the $16,200.00 note) was payable to "Roberta L. Fidler, *only.*" And, it provided for acceleration in the event of default only at the option of "Roberta L. Fidler."

In order for a promissory note or other instrument to be negotiable, it "Must be payable to order or to bearer."

Cal. Civ. Code, Sec. 3082(4);
8 Cal. Jur. 2d 354;
10 C. J. S. 573.

Clearly therefore, the $12,000.00 note lacked this essential attribute of negotiability and fell into the same non-negotiable classification as the $16,200.00 note.

The Monthly Payments Under the $12,000.00 Note Were Subject to Termination in the Event of the Death of Either Mrs. Fidler or Petitioner.

The $12,000.00 note and the full amount of $12,000.00 was not payable absolutely and free of contingency. Although no contingencies were actually expressed therein, in the final form in which it was incorporated in the agreement of February 4, 1944, there were certain contingencies which the law created and implied. If Mrs. Fidler had died within the 24 months period during which the $500.00 monthly payments fell due under said note and prior to the full payment of the $12,000.00, Mr. Fidler's obligation to make further payments would have immediately terminated and ceased. This is true because the $500.00 monthly payments under said note and agreement were founded upon and in partial satisfaction of the legal obligation which the law imposed upon petitioner to support his wife, and that obligation would have come to an end upon the death of Mrs. Fidler irrespective of whether the full $12,000.00 provided as the maximum payable under said note had in fact been paid or not.

It cannot be disputed that the payments under this note, as well as those under the $18,000.00 and $16,200.00 notes, were for one and only one purpose, namely, to provide for the support and maintenance of Mrs. Fidler. The agreement of the parties establishes this beyond doubt, in paragraph Seventh thereof [Tr. p. 71]. The Tax Court so found in its Findings of Fact [Tr. pp. 137, 138]. These payments were clearly in the nature of alimony, for the support and maintenance of petitioner's wife, and were entirely separate and distinct from the provisions of paragraph Sixth of the agreement [Tr. p. 69] which divided the property of the parties between them.

If the California law governs in the interpretation of the agreement as the parties provided by paragraph Twenty-Fourth [Tr. p. 83], then the payments under the $12,000.00 note were contingent upon Mrs. Fidler remaining alive during the payment thereof, and had she died, petitioner's obligation to make further payments would have come to an end. The California courts hold that the obligation to pay alimony and support ceases to be effective upon the death of *either* spouse.

> *Roberts v. Higgins,* 122 Cal. App. 170, 9 P. 2d 517.

This Court has itself held that the death of the wife would terminate the payments and therefore render the husband's obligation contingent and not specified in a principal sum, in *Davidson v. Commissioner,* No. 13,767, decided January 27, 1955, ... F. 2d ....., where, in considering a similar question involving a California property settlement and divorce decree, the Court said:

> "This contention ignores the possibility that the wife may either die or remarry before the expira-

> tion of the period delineated in the decree. In either event the payments would terminate. The existence of these contingencies makes it impossible to determine in advance with any degree of accuracy the amount to be paid under the decree. Section 22(k) clearly contemplates an amount definite in nature."

As to this aspect of the case, there is no difference in principle between the *Davidson* case and the case at bar. The agreement and decree in the *Davidson* case also failed to expressly provide that the payments should terminate in the event of the wife's death, but this Court nevertheless held that such contingency was present and therefore rendered the total amount payable uncertain.

Nor should the *Davidson* case be distinguished from the case at bar merely because in the case at bar the total amount to be paid under this note in the event that the contingency did not occur, namely, $12,000.00, was set forth in the note and agreement, whereas in the Davidson agreement the total amount to be paid was not set forth. In *J. B. Steinel,* 10 T. C. 409, the Tax Court, in attempting to ignore the contingencies involved, attempted to rely upon the fact that the total amount to be paid if the contingencies did not take place was actually stated in the document. This reasoning was held to be unsound in *Baker v. Commissioner* (1953, 2nd Cir), 205 F. 2d 369, and *Smith's Estate v. Commissioner* (1953, 2nd Cir.), 208 F. 2d 349, when said Courts repudiated the rule of the *Steinel* and similar cases. The *Smith* and *Baker* decisions are cited with approval in this Court's decision in the *Davidson* case.

Thus, under the *Davidson* case and the California decisions, the payments were clearly subject to the contingency of the wife's death and would have terminated and ceased in the event of her death. The same rule applies in Nevada, where the divorce decree herein was actually rendered. In *Foy v. Smith's Estate,* 58 Nev. 371, 81 P. 2d 1065, the Nevada Supreme Court, in holding that the right to support terminated upon the death of the wife, reasoned in part as follows (81 P. 2d 1065, at 1067):

> "* * * the right to support was purely personal. From the very nature of the right it could be nothing more. It was a right which she (the wife) alone could enjoy. Its duration depended upon her survival. There can be no support for a non-existing person."

The foregoing contention is strengthened by the fact that the monthly payments under the $12,000.00 note (as well as the $16,200.00 note) were payable to Roberta L. Fidler, *only.* The word "only" cannot be ignored. The payments were personal, in nature, to her alone. If she had died, neither her estate, her personal representative nor any one else, under this express language, would have been entitled to receive further payments. This is a reasonable construction. The payments were for her support and maintenance. Upon her death, the necessity for such payments would have ceased, and the legal obligation of petitioner to support her would have come to an end.

The Death of Petitioner Would Have Terminated the Payments Under the $12,000.00 Note.

Still another contingency which would have terminated the payments under said $12,000.00 note would have been the death of petitioner.

Roberts v. Higgins, supra, 122 Cal. App. 170, 9 P. 2d 517;

27 C. J. S. p. 999;

Smith's Estate v. Comm'r, supra, 208 F. 2d 349.

The Remarriage of Mrs. Fidler Was Also a Contingency Which Would Have Affected Petitioner's Obligation to Continue the $500.00 Monthly Payments Under the $12,000.00 Note.

In petitioner's reply brief herein, at page 5, reference was made to the fact that the death of either Mrs. Fidler or petitioner as well as the remarriage of Mrs. Fidler would have terminated the payments under the decree.

If, as petitioner has contended, the obligations of petitioner under the agreement and promissory notes were superseded by and merged into the divorce decree which spelled out in precise terms and amounts the monthly payments to be made, then, under Nevada law, the remarriage of Mrs. Fidler would have terminated Mr. Fidler's obligation to continue to make payments. (Nevada Compiled Laws (1929), Sec. 9465; 27 C. J. S. p. 1090.) However, if the precise payments as ordered by the decree are ignored and if instead reference is made to the agreement and the notes themselves, a careful analysis and examination thereof will reveal that there is nothing in

the agreement nor in the notes which expressly obligated the petitioner to continue to make the support and maintenance payments to Mrs. Fidler in the event of her remarriage.

The California statute, in force at the time of this agreement, which prescribed the nature and extent of the obligation of a husband to support his divorced wife, provided that he might be compelled to make suitable allowance for her support, during her life or for such a shorter period as the Court might deem just, and concluded with this express provision:

> "Upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support * * *" (Cal. Civ. Code, Sec. 139.)

This statutory provision is declaratory of the common law rule.

> *Hansen v. Hansen,* 93 Cal. App. 2d 568, 209 P. 2d 626;
>
> *Stucker v. Katz,* 92 Cal. App. 2d 843, 207 P. 2d 879;
>
> 27 C. J. S. p. 1090.

The condition which was specified in the note for $12,000.00 as prepared under the original agreement of August 20, 1943 (and to which the Court has referred in its opinion at p. 7, footnote 4), did no more than to incorporate the common law and statutory rule above set forth, save and except that the language of the condition as stated went further and would have terminated future payments even though Ruth Fidler had purportedly en-

tered into a marriage which was not, in fact, valid. To this extent, the proviso may have given petitioner more protection than otherwise, because the rule as codified in Section 139 might not have relieved the husband of his obligation in the event that the wife had entered into a purported new marriage which was not in law a valid one.

However, the elimination of the proviso originally contained in the $12,000.00 note did not make inapplicable the statutory rule above referred to, and this statute by implication and operation of law constituted a qualification of petitioner's obligation.

Cf.:

Hansen v. Hansen, supra.

It is, therefore, respectfully submitted that the $12,000.00 note was not a negotiable note and was not payable absolutely and free of any contingencies. It was payable *only* to Mrs. Fidler. The obligation to continue payments thereunder would undoubtedly have been terminated by her death, or by the death of Mr. Fidler, and in all probability would have been terminated in the event of her remarriage. For these reasons, it, and the $500.00 monthly payments falling due under it, should be considered in the same contingent category as the $16,200.00 note.

The Aforesaid Contingencies Were Also Applicable to the $18,000.00 Note, While Said Note Was Held by Mrs. Fidler.

The $12,000.00 note, as above pointed out, because it was made payable to "Roberta L. Fidler only" was especially vulnerable to the contingency that Mrs. Fidler might die before full and complete payment thereof, in which event future payments would cease. However, on principle, the same contingencies above discussed with respect to the $12,000.00 note were likewise applicable to the $18,000.00 note, *so long as said note was not negotiated to a bona fide holder for value.* It might very well be true, as the Court stresses in its opinion, that if this note had been negotiated by Mrs. Fidler to a bona fide purchaser for value, said purchaser could have enforced it against Mr. Fidler irrespective of the occurrence of any of the contingencies above set forth. But, the rights of a bona fide holder for value are not involved. The fact remains that the note was continuously held by Mrs. Fidler, if it be assumed that it was not merged into and superseded by the divorce decree. The payments provided therefor were, as hereinbefore demonstrated and as found by the Tax Court, in the nature of alimony and for her support and maintenance. There is nothing in the agreement, nor in the provisions of the note itself, which provides that the obligation of Mr. Fidler to make payments thereunder in satisfaction of his legal obligation to support and maintain her should continue after her death, when the necessity for such support and maintenance would have completely ceased. The same is true with respect to the other contingencies.

The Three Notes Involved Were Not "Entirely Separate and Distinct in Purpose and Character," as the Opinion Herein Holds.

The Opinion Erroneously Considered Each Note Separately, and Failed to Consider the Three Notes, in the Aggregate, in Determining Whether Petitioner's Alimony or Separate Maintenance Obligation Was Specified in a Principal and Fixed Sum.

Petitioner respectfully submits that the payments of $300.00 per month and $500.00 per month provided for by the notes were not "entirely separate and distinct in purpose and character," as the opinion herein holds at page 4. To the contrary, they were but of a single character and had but one common purpose. In character, they were alimony payments, and, as to purpose, they all had one and the same, namely, to state and provide the money which Mr. Fidler would have to pay to his wife in fulfillment of his legal obligation to support and maintain her. None of said notes was intended to provide payment of property rights but all were founded upon and each was intended to provide money payments in satisfaction of petitioner's "alimony or separate maintenance obligation."

The Court, in its opinion at page 8, calls attention to the sentence which appears in Section 22(k) of the Internal Revenue Code and which reads as follows:

> "Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument, shall not be considered periodic payments."

In determining what Congress intended by the word "obligation" as used in said sentence, it is necessary to

read and construe said sentence in conjunction with the preceding sentences in said Section. Only by so doing can it be determined what "obligation" Congress had in mind when it referred to installment payments discharging a part of an obligation the principal sum of which is specified.

The preceding portions of Section 22(k) read as follows:

> "(k) Alimony, Etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or prop-

erty, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; * * *"

Is it not reasonable to conclude, from the entire paragraph, that the "obligation" referred to in the sentence quoted by the Court is the previously referred to "legal obligation which, because of the marital or family relationship, is imposed or incurred by such husband?"

The legal obligation referred to is further limited to that which arises out of the general obligation of the husband to support his wife.

The Treasury Regulations promulgated by the Bureau of Internal Revenue under the Internal Revenue Code so provide.

Treasury Regulations 111, which were in effect at the time of the agreement involved herein, provided in part as follows:

"Sec. 29.22(k)-1. *Alimony and separate maintenance payments—Income to former wife—(a) In General.* (1) Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. * * *

* * * * * * * *

"(5) Section 22(k) applies only where the legal obligation being discharged arises out of the family or marital relationship *in recognition of the general obligation to support*, which is made specific by the instrument or decree. * * *" (Emphasis ours.)

The same construction and interpretation is stated in the House Report of Congress, referred to in petitioner's

opening brief at page 22, wherein the Congressional Committee in part stated, with respect to the effect of Section 22(k) as follows:

> "This treatment is provided only in cases of divorce or legal separation and applies only where the *alimony or separate maintenance obligation* is discharged in periodic payments." (Italics added.)

When the foregoing are considered, it is apparent that the word "obligation" as utilized in the particular sentence in question, refers to "the alimony or separate maintenance obligation" (in the language of the Congressional Committee) which the law imposes upon the husband by reason of the marital relationship.

In other words, it is submitted that the quoted sentence in question should be construed as if it read as follows:

> "Installment payments discharging a part of the alimony or separate maintenance obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments."

Under this interpretation, the question in this case would be: was the amount which Mr. Fidler agreed to pay to his wife in discharge of the alimony or separate maintenance obligation specified as a principal sum?

In order to answer this, it would be necessary to consider the agreement and the three notes, as a whole and together, rather than separately, because only by calculating the aggregate sums to be paid under all three notes can we attempt to ascertain whether or not Mr. Fidler's alimony or separate maintenance obligation to his wife has been specified in a principal and fixed sum. Each of the notes were intended to supply payments in but

partial satisfaction of the total alimony or separate maintenance obligation.

Petitioner again respectfully urges, as he did in his opening brief herein at page 39, that in determining whether Mr. Fidler's obligation, within the meaning and contemplation of Section 22(k), was specified in a principal sum in the instruments or decree, it is necessary to consider the notes as a group. They were intimately related in such way that they together, and with the agreement of which they were a part, provided continued regular monthly payments of money for current maintenance and support of Mrs. Fidler in an amount not less than $500.00 per month nor more than $800.00 per month. They, together, made up the petitioner's alimony or separate maintenance obligation.

It was Mrs. Fidler's own attorney, who in the first instance, prepared the decree which "lumped" the payments due under the series of notes into one monthly payment of $800.00 per month, at the time the original divorce decree was entered. Mrs. Fidler, through her attorney, recognized that notwithstanding the form of the notes, the substance and effect thereof was to entitle her to a single monthly payment for her support and maintenance not to exceed $800.00 per month.

In the words of the Third Circuit Court, in *Smith's Estate v. Commissioner, supra,* 208 F. 2d 349, these notes, and the agreement pursuant to which they were executed, when read and interpreted in relation to each other, constituted "the month-to-month kind of payment for support in which the Congress was seeking relief for alimony-paying ex-husbands."

The notes should not be viewed and treated as isolated and separate undertakings. We again respectfully refer

the Court, on this aspect, to the views stated by Judge Hastie, in *Smith's Estate v. Commissioner, supra,* extracts of which are quoted in petitioner's opening brief at pages 48, 49.

The opinion herein states, at page 9, that:

> "In going over the negotiations, it is difficult to escape the idea that the wife was insistent upon the fixed principal sums of $18,000.00 and $12,000.00 and that petitioner finally agreed thereto."

We submit that the history of the negotiations emphasize a different purpose. Taken as a whole, they show that the principal thing which the wife was striving for (in addition to her share of the property of the parties) was an assurance that she would receive from petitioner a minimum of $500.00 per month for her support and maintenance. She likewise wanted some assurance that those payments would be made promptly when due, and in order to insure punctual payment thereof and to deter petitioner from permitting any monthly payment to become delinquent, the acceleration clause was put into the notes. Mr. Fidler was thereupon put upon notice and in such position that if he defaulted in any payment, he faced an immediate action for the remaining maximum balance stipulated in the note. This, the negotiations would indicate, was the motivating factor underlying these notes. And, finally, after further negotiations, the wife succeeded in getting the ultimate arrangement whereby she was assured of a minimum of $500.00 per month for her support and maintenance with the right to receive as much as $800.00 per month if Mr. Fidler's income from his radio employment remained at the same level.

That the principal purpose and intention of the parties, as set forth in the final agreement of February 4, 1944,

was to provide Mrs. Fidler with a minimum of $500.00 and a maximum of $800.00 per month for her support and maintenance (as distinguished from paying her "fixed principal sums of $18,000.00 and $12,000.00" as the opinion states) is conclusively established and demonstrated by the very language of paragraph Eighth of the agreement [Tr. pp. 75 and 76].

The Fixed Amounts Set Forth in the Promissory Notes Were Not Specified in the Divorce Decree as Principal Sums by Reference.

One of petitioner's principal contentions herein has been that the divorce decree superseded the property settlement agreement and notes executed as a part thereof, and that the decree controlled in determining the measure and extent of petitioner's obligation to make the monthly payments originally contemplated by the agreement and notes. Petitioner has in his briefs herein cited numerous authorities recognizing the basic principle that the decree is controlling, including the decision by the Supreme Court in *Harris v. Commissioner,* 340 U. S. 106, 71 S. Ct. 181. In answer to this contention, the opinion herein states at page 8:

> "If the rule be adopted that the 'decree' is controlling, as some opinions say, still each of these principal sums was specified therein because of the incorporation of these fixed amounts by reference. There may be more exact methods of specifying a principal sum in terms of money, but none readily suggests itself."

Petitioner asks, how can it be reasonably concluded that there was an incorporation of the "fixed sums" by reference when the divorce court actually spelled out and specified the exact payments to be made each month, and thus specifically covered the subject matter involved with-

out making any reference whatsoever to the total sums set forth in the notes? Having undertaken to spell out, as a part of its order, the exact amounts to be paid by petitioner (as distinguished from merely referring to and incorporating the agreement), the court covered this particular aspect of petitioner's obligations under the agreement, and the decree measured and stated the extent and amount of his alimony obligation.

Such incorporation of the notes' "fixed sums" might have occurred if the decree in this case had merely stopped with the paragraph (quoted at page 2 of the opinion) whereby the Court ordered that the settlement agreement be confirmed, ratified, approved and adopted as a part of the decree. Or, more simply and clearly, such incorporation by reference of the fixed sums would have occurred if the decree had added to said paragraph language substantially as follows:

> "And, the defendant is ordered to pay the promissory notes referred to in said settlement agreement in the amounts of $18,000.00, $12,000.00 and $16,200.00, in accordance with the terms and provisions thereof."

Under either of the foregoing methods, it could be reasonably concluded that the fixed amounts provided by the notes had been made part of the decree by reference. The latter clause above suggested especially would have been a very simple and easy method of making such incorporation by reference.

But, the decree did not do this—it undertook to spell out in exact dollars the exact amount which petitioner was ordered to pay each month, without any reference whatsoever to the maximium amounts specified in the notes, and it in effect constituted an order to make those exact pay-

ments which order the petitioner was compelled to comply with, irrespective of whether it was consistent or inconsistent, with the terms of the various notes. The decree may have varied, in some degree and respects, from the precise terms and provisions of the note. Yet the decree is what governs and controls in the event of any difference between the terms thereof and the terms of the promissory notes.

Even though the decree may not have fully reflected the actual agreement of the parties with respect to the payments to be made, nevertheless, this was the judicial action of the Court, and if the Court's order were in any way erroneous, it was judicial error which has become final.

In this regard, there is no substantial inconsistency between the notes and the decree. The divorce court, as well as Mrs. Fidler's counsel, recognized that in specifying Mr. Fidler's alimony obligation, it was necessary, reasonable and proper to consider all three notes, as a unit, and not to regard them as separate or isolated undertakings, in arriving at the monthly amounts to be paid by petitioner to his wife for her support and maintenance.

The necessary conclusion that the divorce decree's specification of payments is controlling is not changed by that paragraph of the decree (which the opinion quotes at the bottom of page 2) requiring the parties to comply with those "executory provisions" of the agreement which were *not* incorporated in the decree in a plenary manner. The decree did, fully and specifically, cover the subject matter of the monthly payments.

Likewise, paragraph Twentieth of the Agreement, referred to in the opinion at page 7, footnote 3, dealing with the right of Mrs. Fidler to legally proceed against any

property of the petitioner for the purpose of enforcing the terms of the promissory notes—does not affect the controlling effect of the decree, after it was entered. Certainly, until a divorce decree had been entered between the parties and had adjudged the monthly payments to be made, Mrs. Fidler would have had her action at law on the promissory notes to enforce their payment. But, once the decree was rendered and Mr. Fidler was ordered to make the monthly payments, the decree superseded the notes and agreement and became controlling.

By the decree, Mrs. Fidler gained a more powerful way to compel immediate and punctual payment of the monthly sums than she had possessed under the notes—she now had the right to have petitioner punished for contempt and, if necessary, imprisoned if he failed to make the payments when due.

The agreement of the parties did not provide that it or the notes should *survive* and exist after a divorce decree adopting same had been entered between the parties. Even if it had so provided, the decree would still have controlled.

Harris v. Commissioner, supra.

In this connection, it must be remembered that until a divorce decree or decree of separation was rendered between the parties, Section 22(k) never came into operation, irrespective of whether there were any payments made before such decree, and irrespective of what kind of an agreement the parties may have made. Section 22(k) operates only with respect to payments made *subsequent to the decree.* The rendition of the decree is all important, and the decree is the document which creates the rights and duties, irrespective of whether it follows in detail the terms of the agreement.

As the Supreme Court stated in *Harris v. Commissioner, supra,* at 71 S. Ct. 181, 184:

> "* * * The happenstance that the divorce court might approve the entire settlement, or modify it in unsubstantial details, or work out material changes seems to us unimportant. *In each case it is the decree that creates the rights and duties;* . . ." (Emphasis added.)

And, having undertaken, in specific language, to order petitioner to make certain payments, the decree governs, and modifies the notes to the extent that there is any inconsistency.

Subsequent to the entry of the decree, Mrs. Fidler would not have had any right of action on either the notes or on the property settlement agreement which was incorporated and made an operative part of the decree, but her sole remedy would have been on the decree, including such aids as execution, contempt and other enforcement process of the Court, together with an action on the decree.

Hough v. Hough, 26 Cal. 2d 605, 160 P. 2d 15.

If the decree is controlling, then there was no principal sum specified therein and this case falls squarely within the rule announced by this Court in *Myers v. Commissioner,* 212 F. 2d 448.

If the Court agrees that the decree is controlling but still believes that each of the principal amounts set forth in the notes were incorporated into the decree by reference, then for reasons above set forth, the notes should be viewed together and in the aggregate in determining whether the three of them did fix and specify Mr. Fidler's alimony obligation in a "principal sum." By reason of the contingency expressed in the $16,200.00 note as well as the

other contingencies which affected all three notes, no such principal sum can be spelled out.

Davidson v. Commissioner, supra.

If, notwithstanding the foregoing, the Court still feels that the negotiable nature of the notes is to be the standard by which this case should be determined, then we respectfully submit that the $12,000.00 note—which was clearly a non-negotiable instrument—must be placed in the same status as the $16,200.00 note, and the $500.00 payments contemplated under said $12,000.00 note must also be considered as "periodic payments."

Conclusion.

Petitioner respectfully submits that this petition for rehearing should be granted, and that for the reasons hereinabove stated, this Court should determine that the entire amount of each $800.00 monthly payment involved constituted a periodic payment within the provisions of Section 22(k) of the Internal Revenue Code.

However, and irrespective of whatever treatment may be accorded to the $500.00 monthly payments originally contemplated under the $18,000.00 note, it is clear that the $12,000.00 note was not a negotiable instrument and was subject to contingencies which rendered the total amount to be paid thereunder uncertain and indefinite, and the payments under this note should also be construed as periodic payments under said Section.

Respectfully submitted,

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Counsel for Petitioner.

Certificate of Counsel.

I, Nelson Rosen, state that I am a member of the law firm of Zagon, Aaron & Sandler, and I am one of counsel for petitioner herein. I have prepared the foregoing petition for rehearing and certify that in my judgment it is well founded and that it is not interposed for delay.

NELSON ROSEN.